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February 25, 1999

VIA MESSENGER

Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re CC Dockets No. 98-147

Dear Ms. Salas:

On Monday, February 22, 1999, Glenn Manishin and the undersigned, counsel for Rhythms NetConnections Inc. and MachOne Communications, Michael Olsen and Ruth Milkman, counsel for NorthPoint Communications and Thomas Koutsky, counsel for Covad Communications met with Chris Wright, Suzanne Tetreault, Jeff Lanning and Nick Bourne of the Office of General Counsel to address issues raised in the captioned proceeding in light of the Supreme Court's decision in *Iowa Utilities*. The attached materials were distributed and summarize the issues discussed.

Pursuant to Section 1.1206 of the Commission's Rules, two copies of this letter are enclosed for filing. Please contact me should you have any questions in regard to this matter.

Sincerely,



Christy C. Kumin

CCK:hs

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

UNE Standards and Rules After *Iowa Utilities*

Meeting with Chris Wright, OGC
Monday, February 22, 1999, 2:00 p.m.



Covad Communications, MachOne Communications,
NorthPoint Communications, Rhythms NetConnections

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Today, Only the Advanced Data Services Market Is Developing Substantial Competition

- FCC action will ensure continued rapid deployment of the only demonstrable success of the 1996 Act.
- Financial and consumer markets must be assured that the FCC will safeguard competition.
- Only immediate, definitive and formal FCC action will counteract the ILECs' expressed recalcitrance.
- The ILEC "Letter Commitments" are a start, but these non-binding commitments are not sufficient to provide certainty to the marketplace.

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FCC Must Take Four Decisive Actions to Preserve Data Services Competition

- *Release 706 Order:* Immediately issue the 706 Advanced Services Order, including provisions on collocation, remote terminals, loops and line sharing.
- *Issue Order:* Immediately issue an order declaring that ILECs cannot “Just Say No” under the 1996 Act.
- *Promulgate Interim Rules:* At the March Open Meeting, set Interim Rules preserving the UNE *status quo* under a more than “*de minimis*” standard.
- *Release Expedited UNE NPRM:* Release an NPRM for UNE requirements on an expedited notice and comment basis.



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Immediate Release of the 706 Order Will Promote Competitive Data Services Markets

- Nothing in *Iowa Utilities* precludes Commission action in Advanced Services rulemaking.
- *Iowa Utilities* strongly validates the FCC's jurisdiction and broad rulemaking discretion under the 1996 Act.
- Non-UNE related issues in the 706 order — including collocation and remote terminals — are not affected.
- Under *Iowa Utilities*, loops meet virtually *any* standard for UNEs — the FCC should issue the loop-related portions of 706 Order, including line sharing.

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Despite Commitment, ILECs “Just Say No”

- GTE first refused to sign new contracts or even talk with CLECs about UNEs, forcing CLECs to arbitrate.
- GTE will only sign agreements if CLECs agree to waive combinations and if it retains the ability to decide which FCC ordered UNEs it will provide.
- Bell Atlantic publicly contends, as widely reported, that after *Iowa Utilities* it no longer has any legal obligation to provide loops.

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The FCC Must Decisively Order that ILECs Cannot “Just Say No” In UNE Provisioning

- In order to forestall ILECs from refusing to deal with DSL competitors, the FCC must affirmatively hold that an ILEC's blanket refusal to provide UNEs violates the Act.
- The FCC must also reaffirm its commitment to enforce all its rules, including all existing UNE pricing rules.

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Policy Reasons to Establish Interim Rules for UNEs

- To preserve *status quo* and prevent the competitively destructive absence of law that could cause a substantial disruption in telecommunications markets.
- To reassure financial and consumer markets of the continued viability of data and advanced services competition.

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Legal Bases for Establishing Interim UNE Rules

- To avoid substantial disruption in the operation of telecommunications markets, the FCC has “good cause” under the APA to enact interim rules without notice-and-comment.
- FCC plainly has procedural authority to promulgate interim rules under a revised legal standard that will be subject to full record development in an expedited companion NPRM.

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Interim UNE Standard

- An ILEC must provide a UNE if failure to provision that element would have more than a “de minimis impact” on a competitor.
- The FCC-identified UNEs meet this revised legal standard and must be provided in the interim.
- Based on the extensive record developed in the *First Report & Order*, denial of UNEs would have more than a *de minimis impact* on competitors’ ability to do business.

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The FCC Must Expedite the UNE NPRM

- An expedited proceeding is appropriate in light of the extensive record already developed on UNEs.
- The telecommunications markets require final and swift resolution of the unbundling requirements.
- Rapid resolution of the unbundling issues will minimize any backlash from an interim rules Order.

FCC MEETING TALKING POINTS
Covad Communications, MachOne Communications,
NorthPoint Communications & Rhythms NetConnections Inc.
Chris Wright, OGC
Monday, February 22, 1999, 2 p.m.

I. Today, Data Services is the only market where real competition is taking hold

- A. FCC action now will ensure continued rapid deployment of the only demonstrable success of the Telecommunications Act of 1996.
 - 1. Continued vibrant data competition depends on assuring the financial and consumer markets that the FCC will safeguard the competitive requirements of the 1996 Act.
 - 2. Only definitive, formal FCC action will counteract the negative messages widely circulated by ILECs prognosticating the end of essential UNEs.
- B. The ILEC "Letter Commitments" are a start, but are not sufficient, as evidenced by the expressed recalcitrance of ILECs despite these nonbinding commitments to the Chairman.
- C. To preserve this one area of true competition, the FCC must Act now, because waiting until the Summer (*i.e.* dealing first with voice service UNEs) threatens data competition.

II. Immediate release of the 706 Order is essential to ensure continued rapid deployment of advanced data services

- A. Nothing in *Iowa Utilities* precludes this Commission action.
- B. *Iowa Utilities* was a validation of the FCC's jurisdiction and broad discretion to promulgate rules under the Communications Act.
- C. Non-UNE related 706 issues in the "held" 706 order — including collocation and remote terminals — are not implicated by *Iowa Utilities* and accordingly should be issued immediately.
- D. On the record developed for the *First Report & Order*, it is clear that under virtually *any* standard that would comport with *Iowa Utilities*, loops will be considered UNEs; thus the FCC should also issue the loop-related portions of 706 order, including line sharing. (See *First Report & Order* ¶ 368 (referencing ILEC comments that loops should be UNEs), ¶¶ 377-378. In addition, Congress recognized loops as necessary by specifying them in the competitive checklist and requiring they be provided to obtain relief under section 271. 47 U.S.C § 271(c)(2)(B)(iv).

III. Issue Order that ILECs cannot "Just Say No"

- A. Despite its letter to the Chairman, GTE has refused to sign new contracts or even talk with CLECs about UNEs, forcing them to file for arbitration with the state commissions. Further, GTE will only sign agreements if CLECs agree to waive combinations and if it retains the ability to decide which FCC-ordered UNEs it will provide. This is a clear signal that they will not abide by the FCC's rules.
- B. Days after "assuring" the Chairman that it would honor its existing contracts, Bell Atlantic told the Massachusetts commission that it no longer had any obligation to provide loops. This assertion was widely reported in the trade press. (See, e.g., *Communications Daily*, February 12, 1999).
- C. Thus, the FCC must issue an order affirmatively holding that ILEC refusal to provide UNEs constitutes a violation of their statutory obligations. This will preclude ILECs from flat refusals to competitors.
- D. The FCC must also reaffirm its commitment to enforce all its rules, including all existing UNE pricing rules.

IV. Establish Interim Rules under revised standard and release an NPRM on an expedited track for UNEs

- A. At this juncture, over 2 years after the 1996 Act, an absence of law on UNEs is intolerable. To avoid a substantial disruption in the development of competitive telecommunications markets, the FCC has "good cause" to enact interim rules. *Methodist Hosp. V. Shalala*, 38 F.3d 1225, 1236-37 (D.C. Cir. 1994); *United Tech. Corp. v. EPA*, 821 F.2d 714 (D.C. Cir. 1987). See also *Shell Oil Corp. v. EPA*, 950 F.2d 741, 752 (D.C. Cir. 1991); *Electric Coop. v. FERC*, 822 F.2d 1123, 1134 (D.C. Cir. 1987).
- B. On an interim basis, the FCC should preserve the *status quo* and prevent the disruptive and competitively destructive absence of law, by ordering that—subject to full development of the record on an expedited basis in a companion NPRM—each of the elements identified in the *First Report & Order*, meet a more stringent standard. Based on the record developed pursuant to the *First Report & Order*, denial of those elements would have more than a *de minimis* impact on competitors' ability to do business. *First Report & Order*, ¶ 378.
- C. Thus, the Commission should Order that an incumbent must provide a UNE if failure to provision that element would have more than a *de minimis* impact on the CLEC. This standard can be examined in detail in further rulemaking proceedings, but will immediately provide the Commission adequate grounds upon which to impose unbundling duties in the interim. *American Fed. Of Gov't Employees v. Block*, 655 F.2d 1153 (D.C. Cir. 1981) (upholding final USDA regulations pursuant to judicial vacation of prior USDA regime).